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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 724

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SUBURBAN LUMBER COMPANY,
*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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FLOYD H. BRADLEY,
*Counsel for Petitioner.*

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 724

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SUBURBAN LUMBER COMPANY,
*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD.

---

## PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petition of Suburban Lumber Company, respectfully shows to the Honorable Court:

### Summary Statement of the Matter Involved.

On or about December 10, 1936, the petitioner, Suburban Lumber Company, a small retail outlet for lumber and building material, discharged certain of its employees. Alleging that said employees had been discharged because of their membership or interest in a labor organization known as International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local Union No. 676, said Union filed charges and amended charges against

petitioner with the National Labor Relations Board. The Board thereupon issued its complaint, charging petitioner with violation Section 8, paragraphs (1), (3) and (5) of the National Labor Relations Act, by the alleged discriminatory discharge of the aforesaid employees, and by petitioner's alleged refusal to bargain collectively with said Union. After hearings were held at Philadelphia on February 18 and 19, 1937, the trial examiner, Robert M. Gates, Esq., rendered an intermediate report dated March 20, 1937, finding that petitioner had engaged in certain unfair labor practices and recommending that petitioner cease and desist from such alleged practices and take certain affirmative action. Thereafter, on August 2, 1937, the National Labor Relations Board allegedly rendered its decision finding that petitioner had engaged in the unfair labor practices and allegedly entered its Order requiring petitioner to cease and desist from such unfair labor practices and to take certain affirmative action and notify the Regional Director for the Fourth Region within 10 days from the date of said Order what steps the petitioner had taken to comply therewith.

*Your petitioner was not served with this Order as required by Section 10(c) of the National Labor Relations Act.*

On or about June 15, 1940 the National Labor Relations Board filed its petition for enforcement of the Order alleging that its Order had been served upon petitioner, and certified and filed in the said Court what it alleged to be a transcript of the entire record in the proceeding, including the pleadings and testimony upon which the Order was entered and the decision, findings of fact, conclusions of law and Order of the Board pursuant to the requirements of Section 10(e) of the National Labor Relations Act.

*A Copy of the alleged Order of the Board was not included in the said transcript as filed with the Circuit Court*

*as will appear from the original record herein* (And see R. 1-3). Your petitioner denied in its answer to the petition for enforcement, that the alleged Order had been served upon it and thereupon moved to file as a part of the record and as exhibits in said case, the letter and papers which had actually been served by the National Labor Relations Board upon the attorney for petitioner. Your petitioner's motion was denied by the Circuit Court on September 16, 1940 (R. 128, 129).

Your petitioner urged that the Circuit Court of Appeals for the Third Circuit was without jurisdiction in the matter as the Board had failed to comply with the condition precedent to the Court's jurisdiction, namely, the certifying and filing in the Court of a transcript of the entire record in the proceeding, including the pleadings and testimony upon which the Order was entered and the findings and Order of the Board, as set forth in Section 10(e) of the National Labor Relations Act.

Your petitioner also argued that the Court was without jurisdiction and that the Board was not entitled to have its said Order enforced, by reason of the fact that the Order had not been served upon your petitioner as required by Section 10(c) of the National Labor Relations Act, and that the Board's delay in seeking enforcement of its alleged Order rendered the enforcement at such time inequitable.

Your petitioner, further, argued that the Board had no jurisdiction over your petitioner by reason of the fact that petitioner was not and is not engaged in interstate commerce or in activities materially affecting commerce within the meaning of the National Labor Relations Act.

On June 30, 1941, the Circuit Court filed its opinion enforcing the Board's Order except as to the matter of back pay which was remitted to the Board for further hearing and determination (R. 130-142). A decree in accord-

ance with this opinion was entered September 11, 1941 (R. 142-144).

**Jurisdiction.**

The final decree of the United States Circuit Court of Appeals for the Third Circuit was entered September 10, 1941 (R. 142).

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. Section 347(a)) and Section 10(e) of the National Labor Relations Act, July 5, 1935, c. 372, § 10, 49 Stat. 453 (29 U. S. C. A. Section 160(e)).

**Opinions Below.**

The opinion of the National Labor Relations Board dated August 2, 1937, is reported in 3 N. L. R. B. 194.

The opinion of the United States Circuit Court of Appeals for the Third Circuit was filed on June 30, 1941, and is reported in *National Labor Relations Board* v. *Suburban Lumber Company,* 121 F. (2d) 829.

**Questions Involved.**

1. Did the Circuit Court of Appeals for the Third Circuit have jurisdiction to decree enforcement of the Order of the National Labor Relations Board when a copy of the alleged Order was not served upon the person charged with engaging in unfair labor practices?

2. Did the Circuit Court of Appeals for the Third Circuit have jurisdiction to decree enforcement of the Order of the National Labor Relations Board when a copy of the alleged Order was not filed with the Circuit Court?

3. Did the petitioner have the right to have included in the record before the Circuit Court of Appeals for the

Third Circuit, the papers actually served upon it by the National Labor Relations Board?

4. Does the National Labor Relations Act apply to a small, highly localized enterprise engaged in retail trade?

**Reasons Relied On for the Allowance of the Writ of Certiorari.**

1. The decision of the Circuit Court of Appeals for the Third Circuit involved the construction of Section 10(c) of the National Labor Relations Act which requires that "*the Board shall state its findings of fact and shall issue and cause to be served on such person an order*" and 11(4) of said act which sets forth the manner of service. National Labor Relations Act, July 5, 1935, c. 372, §§ 10 and 11, 49 Stat. 453 and 455 (29 U. S. C. A. Sections 160(c) and 161(4)). This important question of the construction of this Federal Statute has not been but should be settled by this Honorable Court.

According to the opinion of the Circuit Court of Appeals for the Third Circuit, the issue was whether to give a strict or a liberal construction to "these service statutes" and on this question "The courts disagree and are about evenly divided."

2. The decision of the Circuit Court of Appeals for the Third Circuit involved the construction of Section 10(e) of the National Labor Relations Act, July 5, 1935, c. 372, § 10, 49 Stat. 453 (29 U. S. C. A. Section 160(e)) which provides that the Board "*shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction* of the proceeding * * *." This important question of the

construction of this Federal Statute has not been but should be settled by this Honorable Court.

3. The decision of the Circuit Court of Appeals for the Third Circuit involved the determination of the applicability of the National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449-457 (29 U. S. C. A. Sections 151-166) to a small retail lumber company practically all of whose sales are intrastate and employing a force of only thirteen or fourteen, including clerical employees.

4. The decision of the Circuit Court of Appeals for the Third Circuit is probably in conflict with applicable decisions of this Honorable Court.

5. The proper determination of the Federal questions involved herein is of great national importance and should be determined by this Honorable Court.

SUBURBAN LUMBER COMPANY,
By FLOYD H. BRADLEY,
*Of Counsel.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 724

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SUBURBAN LUMBER COMPANY,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD.

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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For Opinions Below, Jurisdiction, Statement of the Case and Questions Presented see pages 1 to 5 of the Petition.

**1. The Circuit Court of Appeals was without jurisdiction to decree enforcement of the alleged order of the National Labor Relations Board because a copy of the alleged Order was never served on petitioner (respondent below).**

It is necessary as a prerequisite to the enforcement by the Circuit Court of Appeals of an Order of the National Labor Relations Board, that a copy of the Order be served on the person charged with unfair labor practices.

Section 10(c) of the National Labor Relations Act provides that:

> "* * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then *the Board shall state its findings of fact and shall issue and cause to be served on such person an Order* requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees, with or without back pay, as will effectuate the policies of this Act." (49 Stat. 453, 29 U. S. C. A. Section 160(c)).

The Act further provides, in Section 11(4):

> "Complaints, *orders* and other process and papers of the Board * * * may be served either personally or by registered mail or by telegraph or by leaving a *copy* thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same." (49 Stat. 455, 29 U. S. C. A. Section 161(4)).

Surely the Act means exactly what it says; that a copy of the Board's Order shall be served on the person allegedly engaging in an unfair labor practice. This provision of the act is so clear that no deviation from the prescribed method can be sanctioned.

In *American Sugar Refining Co.* v. *Delaware L. & W. R. Co.*, 207 Fed. 733 (C. C. A. 3rd Cir.) the Court had occasion to discuss the use by the Interstate Commerce Commission of the broad powers vested in it. The Court said, at page 737:

> "* * * So far, however, as carriers are subjected by the act to the administrative authority of the

> Commission which it establishes, that authority must be strictly pursued. Not otherwise, can its merely administrative orders be enforced. In other words, *acts of the Commission, in exercise of its administrative functions, must, in order to be effective, strictly conform to those provisions and requirements of the act by which its authority is prescribed and defined.*"

The language used by the Court in that case is strikingly applicable to the question under consideration here. Here the reasons for strict adherence by the Board to the requirements of the Act are patent, in view of the vast discretionary control over industry vested by Congress in the Board.

In the present case the alleged Order was never served on the petitioner. The Affidavit as to Service (R. 4) which constitutes the Board's only legal proof of what, if anything, was served upon petitioner, states merely that a copy of the Board's "*Decision*" was served. It was admitted by the Board in its memorandum entitled "Opposition of National Labor Relations Board to Motion of Respondent to Add Certain Papers to the Record", (R. 126) that the papers served upon petitioner were different from the original Decision and Order in that the date line was omitted and the lines upon which the signatures of the members of the Board allegedly appear on the original, are blank. That which was actually served on petitioner appears in the Record at pages 109 to 124.

The Circuit Court of Appeals, in its opinion in this cause conceded that what was served upon petitioner was not a copy of the Board's Order but *nevertheless held that it made no difference whether a copy of the Board's Order was served on petitioner or not.* The court stated (R. 138):

> "Earlier in this opinion we quoted the service of process provision of the National Labor Relations Act. It is in the conventional form and there is, therefore,

> plenty of interpretative authority. *The question is not, of course, whether what was served here is a copy. It requires no citation to sustain the view that an unsigned and undated paper is not a copy of an order that has a signature and a date. The issue is rather should we give a strict or a liberal construction to these service statutes.* The courts disagree and are about evenly divided * * *'' (citing 50 J. C., Process, Effect of Lack of Proper Signature).

It is obvious that petitioner is not required to act on the decision of the Board alone. *Carolina Aluminum Co.* v. *Federal Power Commission,* 97 F. (2d) 435 (C. C. A. 4th Cir.); *Shannahan* v. *U. S.,* 20 Fed. Supp. 1002 (Dist. Ct. N. D. Ind.). The mere finding that an employer is guilty of unfair labor practices means nothing in the absence of an order on such employer to cease and desist from the specified acts and to take affirmative action if that is required. Therefore it is incumbent on the Board to effectuate its decision by issuing an order.

Any formal order must go through a series of preliminary stages before it becomes the mandate of the tribunal issuing it. Even the final draft of a paper intended to become an order is not, *per se,* an order. Some specific action must be taken whereby the lifeless words on the paper become the living mandate of the court or board. It can admit of no dispute that from the earliest days of our jurisprudence, this action has been the signing of the order by the properly constituted authority. *Fox* v. *Lantrip,* 162 Ky. 178, 172 S. W. 133.

This must necessarily be so, particularly in the case of a modern administrative board. In the case at bar, indeed, the Board avers that two of its members did sign the alleged Order. But petitioner received no evidence of this. The Circuit Court of Appeals concedes what the record clearly

shows, that what was served on respondent was *not a copy of the Board's order.* It was not even a copy of the decision but it was called "*Decision*" by the Board in its communication to petitioner (R. 109), as well as in its Affidavit as to Service (R. 4). The papers served on petitioner were undated and unsigned. Surely this was not evidence to the petitioner of the fact that an order had actually been entered, with which it must immediately take steps to comply. The most that petitioner might have been expected to infer was that a decision and order in such form had been submitted to the Board. Petitioner had a right to expect that it would be notified of the entry of the Board's Order by service upon it of a copy thereof showing, by date and signature, that such an order had been made by the Board and was actually in effect. The violation by the Board of this mandatory provision of the statute was thus not a mere technical violation. It was a total noncompliance with a jurisdictional requirement.

We respectfully submit that the attempt by the Board to enforce against petitioner an order requiring affirmative action by petitioner within 10 days of the date thereof, and of which petitioner had no notice, constitutes a denial to this petitioner of the due process of law guaranteed to it by the Fifth Amendment to the Constitution of the United States.

**2. The Circuit Court of Appeals was without jurisdiction in this case because a certified transcript of the record in the proceeding before the Board was not filed with that Court in compliance with the provisions of the Act.**

It is a condition precedent to the jurisdiction of the Circuit Court of Appeals, that a certified transcript of the entire record of the proceeding including the Order of the Board be filed with that court.

Section 10 (e) of the Act reads in part:

> "The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * *and shall certify and file in the court a transcript of the entire record* in the proceeding, *including* the pleadings and testimony upon which such order was entered *and the findings and order of the Board.* Upon such filing, the court shall cause notice thereof to be served upon such person, *and thereupon shall have jurisdiction* of the proceeding and of the question determined therein * * *." (49 Stat. 453, 29 U. S. C. A. Sec. 160 (e).)

The words of the statute are unequivocal and mandatory. To perfect a proceeding for enforcement, the Board *shall* do certain things. Among these is the filing of a certified transcript of the record of proceedings before the Board, which *shall* contain, among other things, the Order of the Board. *Thereupon,* says the statute, the court shall have jurisdiction. *A fortiori,* if these requirements are *not* met, *the court does not have jurisdiction.*

*The requirements of section 10 (e) were not met in this case.* There does not appear in the transcript filed with the Circuit Court of Appeals a copy of the Board's Order. That which was certified by the Board to be a copy of the "Decision and Order" is not a copy of that which the Board claims is the original Order and which appears in its Appendix on pages 1 to 16. It is not a copy of anything. (Compare R. 1-3 with Appendix to Petitioner's (Board's) Brief pages 1 and 16). A comparison of the first page of the paper filed with the Circuit Court (R. 1) with the first page of that which the Board claims is a copy of the Order (Board's Appendix page 2) discloses that the former has

the date "Decided August 2, 1937" and a syllabus while the latter has neither. The last page of the former document (R. 3) has no date line and no signatures and contains the clause, "Chairman Madden took no part in the consideration of the above Decision and Order." The last page of the latter document (Board's Appendix, page 16) concludes as follows:

> "Signed at Washington, D. C., this 2nd day of August, 1937.
>
> [SEAL.] (s.) DONALD WAKEFIELD SMITH,
> *Member,*
>
> (s.) EDWIN S. SMITH,
> *Member,*
> *National Labor Relations Board.*"

By the following authorities a copy is:

> "A true transcript of an original writing." (Baldwin's Century Edition of Bouvier's Law Dictionary)
>
> "The word 'copy' means, not a reproduction of only a portion of the thing copied, but the whole of it." (I Words and Phrases, Second Series, page 1049)
>
> "In ordinary parlance the word 'copy' means not a reproduction of only a portion of the thing copied, but of the whole of it, it implies or requires identity, and normal or reasonable legibility." 18 Corpus Juris Secundum, 130.

That the word "copy" imparts "a very accurate copy" is the rule laid down in 3 Chitty's General Practice (American Edition, Philadelphia, 1836) at page 583, citing cases.

A transcript of the record not containing a copy of the Board's order is not a transcript of the "entire record" within the meaning of Section 10(e) particularly since that section specifically states that *such transcript must include the Order* of the Board. It necessarily follows that a transcript of the entire record was not filed in this case and the Circuit Court was therefore without jurisdiction.

**3. The Circuit Court of Appeals erred in denying petitioner (respondent below) the right to have made a part of the record, the papers served upon it.**

*The record before the Circuit Court did not contain a copy of that which the Board actually served on petitioner.* The Board in its petition for enforcement alleged in paragraph (3) that the Board's decision and order were served on petitioner (respondent below) by sending a copy thereof, by registered mail, to petitioner's attorney (R. 101). This allegation is denied in paragraph "3" of petitioner's answer (R. 103). In support of this denial, the petitioner, after unsuccessful attempts to secure the consent of the Board's Counsel thereto, attempted by motion to have made a part of the record and exhibits in the case the letter and papers actually served by the Board upon petitioner by registered mail, on the ground that it was necessary to have same become a part of the record in order that the Circuit Court might properly consider and determine whether or not the Board was entitled to the relief prayed for and in order that the petitioner's (respondent below) rights might be lawfully protected (R. 105-124).

The service of the Board's Order upon petitioner was a condition precedent to the Board's right to a decree of enforcement of its Order (See point "1" of this Brief). Petitioner contended, as it now contends, that a copy of the Board's Order was never served upon it as required by the Act. To support this contention it endeavored, by its motion, to show the Court what papers actually were served upon it, and further to show that the Board itself described what was served on petitioner's attorney as a copy of its *decision* only.

In making this motion, petitioner relied on and complied strictly with Rule 20(7) of the Circuit Court of Appeals for the Third Circuit, which provides:

> "*Omissions from or Misstatements in Transcript.* If anything material to any party is omitted from the transcript by error or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation or this court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental transcript be certified or a supplemental record prepared and filed." (Third Circuit Rules, 109 F. (2d) XXV.)

In its memorandum in oppositon to petitioner's motion, the Board relied on Section 10(e) of the National Labor Relations Act, (49 Stat. 453, 29 U. S. C. A. Sec. 160(e)) which prescribes the conditions under which the court shall grant leave to a party to adduce additional evidence before the Board. The pertinent portion of this section reads:

> "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript."

This provision obviously has no application here. The question before the Circuit Court of Appeals on petitioner's motion did not concern the validity of the Board's order but merely the propriety of its enforcement. *N. L. R. B.* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197, (C. C. A. 9th Cir.). Petitioner was not seeking to adduce additional evidence bearing on the matters considered by the Board at its hearing. It sought merely to fortify its denial that the Board's order had been served upon it by showing on the record *exactly what it received.*

We submit that this was petitioner's right, and that the denial by the Court to petitioner of leave so to support its denial constituted a denial to it of the due process of law guaranteed to it by the Fifth Amendment to the Constitution of the United States.

**4. The National Labor Relations Act is not applicable to this petitioner for the reason that it is a small highly localized retail business, and was not and is not engaged in interstate commerce or in activities materially affecting commerce within the meaning of the Act.**

Petitioner operates a small retail outlet for lumber and building material, doing less than $201,000 worth of business per year (Board's Appendix, 5, footnote 8). Besides the manager and yard superintendent petitioner's entire working force consists of only 13 or 14 persons (Board's Appendix, 4). Almost 100% of its sales are within the State of New Jersey. Occasional deliveries are made in Philadelphia as favors to individual New Jersey customers. The Board itself, however, agreed that petitioner's out-of-state sales were not sufficient to furnish a basis for the Board's jurisdiction (Board's Appendix, 5).

The only interstate business, *if any*, done by petitioner, consists of its purchases of goods from concerns located outside the State of New Jersey. These purchases aggregated $143,846.61 in 1936. (Board's Appendix, 33.) Although petitioner's drivers spent a small fraction of their time bringing goods from Philadelphia, such pick-ups were not necessary to petitioner's business and petitioner used them only as a means of avoiding layoffs. The Board's witness Earl F. Bartling, petitioner's president and general manager, testified as follows:

> "* * * These trucks are maintained purely for purposes of delivery. If we are too busy delivering,

> the wholesaler then proceeds to deliver the lumber which came in. If we are not so busy, rather than lay the men off, we route our trucks into Philadelphia to pick up the material, or if the customer wants something real quick, rather than wait for the wholesaler to make his own delivery, we will send our truck so as to give a little better service. The actual costs to the company is greater in picking up this material than they would be if we let the delivery follow the other channels." (Board's Appendix, 27.)

Complete cessation of such deliveries to petitioner would not have hampered petitioner, the great bulk of whose purchases were brought to it by rail (Board's Appendix, 23, 24). *There is no evidence that when the strike actually did occur, petitioner's business was hampered. All the evidence shows is that a few trucks were turned away by the pickets* (Board's Appendix, 92, 93), *and there is no evidence that the goods in these trucks were not thereafter delivered to petitioner without delay.*

On the strength of these facts, we submit that petitioner's activities are not and were not of a nature to render it subject to the Act. We acknowledge that the terms "commerce" and "affecting commerce" have been broadened considerably by the courts in their interpretation of the Act. But never have they gone so far as to hold that a retail business such as that of petitioner is a proper subject of the Board's jurisdiction. We submit that they should not do so now.

The Act was never intended to apply to small, highly localized enterprises engaged in retail trade. Its constitutionality was upheld in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, on the ground that it was not, as was contended by the respondent in that case, an "attempt to regulate all industry, thus invading

the reserved powers of the States over their local concerns." (Id. at p. 29). The court said further:

> *"That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system"* (Id. at p. 30).

In another portion of the same opinion the Court said:

> *"But because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country,* it does not follow that *other* industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern" (Id. at p. 41).

It is thus clear that, in upholding the constitutionality of the Act, this Court did not intend to permit Congress to transcend the boundary between that commerce which was interstate and which it might legitimately regulate, and those activities which are essentially local in nature.

The subsequent decisions which have served to fill in the interstices in the skeletal structure of the Act, and to outline its scope and limitations have preserved this essential distinction. These decisions show the line of demarcation to be a nebulous one. The activities of an employer, to render him subject to the Act, must have a "close", "intimate", and "substantial" effect upon and relation to, interstate commerce. *National Labor Relations Board* v. *Jones & Laughlin, supra. Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197. Which activities have and which do not have, such an effect cannot be determined by rule of thumb. *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601.

The existence of jurisdiction must depend upon the facts of the individual case. And the distinction between the en-

terprise which is subject to the Act because of the directness and immediacy of its effect upon Interstate Commerce, and the enterprise which does not so impinge upon commerce as to be subject to the Act, may be one of degree. *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 303 U. S. 453. In any event, somewhere between the far-flung industrial empires and the business of the small town merchant there is a dividing line beyond which the jurisdiction of the Board does not extend. We submit that the retail lumber business of this petitioner is beyond that line, and that *this case* calls for the application of the maxim *de minimis*, to the effect of petitioner's business on interstate commerce. *N. L. R. B.* v. *Fainblatt, supra.*

The great bulk of the cases decided under the Act, where the commerce question was involved, fall into three main classifications. These are as follows:

A. Those in which all or part of the employer's business necessitated direct participation in interstate commerce, the work of its employees being functional thereto. Typical of these is *Washington, Virginia & Maryland Coach Co.* v. *N. L. R. B.*, 301 U. S. 142, which involved an interstate bus company. There is, of course, no doubt that such employees are subject to the Act. In the same category, though on a much smaller scale, are enterprises such as that involved in *N. L. R. B.* v. *White Swan Co.*, 118 F. (2d) 1002 (Certiorari denied October 13, 1941), where a laundry situated in Wheeling, West Virginia, on the Ohio State line, operated several delivery and pick-up routes in Ohio, whereby its trucks regularly moved between it and its customers back and forth across State lines. While the employer in this latter case argued that it was a local enterprise, it was in fact, considerably larger than this petitioner and the regular flow of materials across the Ohio border from its customers to it and from it to its customers con-

stituted an appreciable portion of its business. These facts serve amply to distinguish it from the case at bar.

B. Those in which the employer's business has become so integrated upon a national basis with the inflow of raw materials and the outflow of manufactured products across State lines that it has acquired a key position in the stream of commerce, so that stoppage of its activities would seriously affect such commerce. Typical of these are *N. L. R. B.* v. *Jones & Laughlin Steel Corp., supra, Continental Oil Co.* v. *N. L. R. B.*, 113 F. (2d) 473 (C. C. A. 10th), *Texas Co.* v. *N. L. R. B.*, 112 F. (2d) 744 (C. C. A. 5th), and other cases involving manufacturers and processors whose businesses extend beyond State lines, and are often nation-wide in scope. *Standard Lime & Stone Co.* v. *N. L. R. B.*, 97 F. (2d) 531 (C. C. A. 4th), exemplifies the medium sized concerns which, though smaller, fall in the same category. These cases are scarcely more in point than the first group. How can a steel corporation or a great oil company, the stoppage of one of whose plants may shut down not only its own business but the businesses of other companies which serve it throughout the nation, be compared with a retailer such as respondent, whose position in the economic scheme is such that its failure would hardly cause a passing comment?

C. In this category we find cases in which the employment relation itself is not in interstate commerce—concerns which are not, strictly speaking, "engaged in" interstate commerce at all, but which become subject to regulation under the Act because their activities have a direct impact upon interstate commerce. Here we find the coal mining cases such as *Clover Fork Coal Co.* v. *N. L. R. B.*, 97 F. (2d) 331 (C. C. A. 6th), *N. L. R. B.* v. *Crowe Coal Co.*, 104 F. (2d) 633 (C. C. A. 8th), and *N. L. R. B.* v. *Good Coal Co.*, 110 F. (2d) 501 (C. C. A. 6th). Here also we find

the cases of the big lumbering concerns—*N. L. R. B.* v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9th); fruit growers' cooperatives—*North Whittier Heights Citrus Ass'n* v. *N. L. R. B.*, 109 F. (2d) 76; *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 303 U. S. 453—and the great power companies, *Consolidated Edison Co.* v. *N. L. R. B.*, *supra*. And here we have the much discussed *Fainblatt* case.

In all these cases the volume of the employer's business was vastly greater than that of the business of this respondent. In the coal company cases the employers were units of an industry whose smooth functioning is vital to a large section of American industry.

In the fruit company cases there was involved a young and lusty newcomer to the nation's industrial scene. Its importance and the dependency of the fruit growers and consumers alike upon the smooth functioning of the packing houses, put the latter in a pivotal position so that their stoppage would have an immediate impact on interstate trade. *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, *supra*; *North Whittier Heights Citrus Ass'n* v. *N. L. R. B.*, *supra*.

These cases demonstrate that it is not the direction of the flow of goods in interstate commerce which determines the applicability of the Act. *It is rather the substantial effect of an employer's activities on that commerce which endow the Board with jurisdiction.*

This brings us to the *Fainblatt* case, which still represents the farthest point to which this Court has gone in upholding the jurisdiction of the Board. In that case the respondent was a clothing processor who regularly received materials from their owner in New York, fashioned them into clothing in New Jersey, and returned them to New York, whence they were shipped in interstate commerce. Sometimes the owner's New Jersey representative shipped

the goods directly from respondent's plant into interstate commerce. As this Court said:

> "Throughout the year there is normally a continuous day-by-day flow of raw materials to respondent's factory from points without the state and of finished garments from respondent's plant to New York City and other points outside New Jersey."

The owner of the goods so processed was a New York corporation, wholly owned by respondent's own children. Thus Fainblatt, although technically operating an independent enterprise, served in fact, to quote the Board, as "the principal manufacturing department of Lee Sportswear, a company engaged in selling sporting goods in interstate commerce." *Benjamin Fainblatt et al.*, 1 N. L. R. B. 864, 868. Fainblatt had a force of 60 workers which was later raised to 200. He normally processed a thousand dozen garments a month.

On these facts the Circuit Court of Appeals for the Third Circuit ruled that the Board had no jurisdiction. This Court reversed the Circuit Court and affirmed the Board's order on the ground that interstate commerce was directly involved in the continual transportation of goods back and forth across state lines, and that it could not be said that respondent's effect on such commerce was not substantial. This Court said:

> "Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected *more than that to which courts would apply the maxim de minimis.*"

This Court recognized that it was broadening the concept of interstate commerce considerably beyond the then prevailing notions. Yet its opinion clearly recognized, as

we have heretofore pointed out, that there is a point where the Board's jurisdiction ends. The holding in the *Fainblatt* case was merely that, though the case was an extreme one, that point had not yet been reached.

That this case is infinitely more extreme than the *Fainblatt* case will be readily apparent to this Court. Against 200 employees we have 12 or 13. Against a never-ceasing flow of goods back and forth across state lines we have a few purchases from out-of-state concerns which amount annually to a very small sum. If the applicability of the Act to Fainblatt was a matter of serious doubt, then its inapplicability to this petitioner should admit of no doubt at all! *Petitioner's business cannot have any impact on interstate commerce greater than that to which the maxim de minimis would apply.*

We respectfully submit that Suburban Lumber Company cannot be held subject to the jurisdiction of the Board without virtually destroying the distribution of powers between the Federal Government and the several states prescribed by the Constitution of the United States. That Congress should have authority to regulate local business was never intended by the framers of the Constitution. If this petitioner can be regulated by Congress, then that body, by using the words "interstate commerce" can regulate all local enterprise, destroy most of the regulatory powers of the States, and virtually create a totalitarian system of government within the Constitution itself. Such a possibility has been spoken of before by dissenting justices. *Cf.* Mr. Justice McReynolds dissenting in *N. L. R. B.* v. *Fainblatt supra.* The present case represents the very *reductio ad absurdum* of the term "interstate commerce" which those justices feared. Such a result as the Board contends for here was no more contemplated by Congress when it passed the National Labor Relations Act than it was by the framers of the Constitution.

For the foregoing reasons, we respectfully urge that the Board was without jurisdiction over petitioner.

In view of the broad powers vested in the National Labor Relations Board it becomes a matter of great national concern that the limits of the Board's jurisdiction be precisely determined. The scope of the Board's authority has been steadily widened by the decisions of this Court. We earnestly urge upon the Court that the Board in this instance has overstepped the boundaries of that authority. Such a determination is of vital moment to every local retail business in the country.

**5. Conclusion.**

We, therefore, submit that the Circuit Court of Appeals for the Third Circuit was without jurisdiction in the matter for the reasons urged; that the Circuit Court erred in denying petitioner's motion and in decreeing enforcement of the order of the National Labor Relations Board and that the petitioner's prayer for a writ of certiorari should be granted.

Respectfully submitted,

FLOYD H. BRADLEY,
*Counsel for Petitioner.*

Camden, New Jersey, October 30, 1941.

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# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 724

SUBURBAN LUMBER COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court below (P. A. 130–142)[1] is reported in 121 F. (2d) 829. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 2–16) are reported in 3 N. L. R. B. 194.

[1] Pursuant to stipulation of the parties (P. A. 145–146), the printed record for purposes of the petition for certiorari consists of the appendix to the Board's brief in the court below, referred to herein as (B. A.); and the appendix to the Company's brief and the proceedings in the court below, together referred to herein as (P. A.).

## JURISDICTION

The decree of the court below (P. A. 142–144) was entered on September 10, 1941. The petition for a writ of certiorari was filed on October 31, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

## QUESTIONS PRESENTED

1. Whether the court below was without jurisdiction to enforce the Board's order because of variances between (a) the Board's "Decision" and the copy thereof served upon petitioner, and (b) the Board's "Decision" and the copy thereof certified and filed by the Board in the court below.

2. Whether the National Labor Relations Act applies to a company engaged in the sale of lumber, building materials, and coal within New Jersey, which receives substantially all of its materials, of the annual value of more than $143,000, from out-of-state sources, and whose seven truck drivers spend 16 percent of their time in transporting materials across state lines to the company's premises.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the appendix, *infra*, pp. 11–13.

STATEMENT

Upon the usual proceedings, the Board, on August 2, 1937, issued its findings of fact, conclusions of law, and order embodied, in accordance with its then uniform Board practice, in a typewritten document entitled "Decision" (B. A. 2–16). The Board found that petitioner had engaged in certain unfair labor practices affecting commerce, and directed that petitioner cease and desist therefrom and take certain affirmative remedial action (B. A. 2–16). Neither the findings concerning unfair labor practices nor the appropriateness of the order are challenged in this Court. The jurisdictional findings may be summarized as follows:[2]

Petitioner operates a retail lumber, building material, and coal yard at Oaklyn, New Jersey, where it employs three office workers and ten or eleven workmen, seven of whom are engaged in driving trucks (B. A. 4; B. A. 17–18, 29–30, 44, 79). Almost all of petitioner's sales, which in 1936 amounted to approximately $200,000, are made in New Jersey; almost all of petitioner's purchases, which in the fiscal year ending November 30, 1936, amounted to more than $143,000, are shipped to petitioner from points outside New Jersey (B. A. 4–5; B. A. 22–25, 36). Petitioner receives the bulk of these out-of-state purchases

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

by rail on its own siding, and a further substantial portion by steamer at docks in Philadelphia, Pennsylvania, and Camden, New Jersey, from where it is delivered to petitioner's yard by railroad, trucks hired by the seller, or petitioner's own trucks (B. A. 4–5; B. A. 23–25). Approximately 16 percent of the time of petitioner's truck drivers is consumed in interstate hauling of such purchases from Philadelphia to petitioner's yard (B. A. 4; B. A. 26, 49–50, 71, 74–75, 79, 88).

On the day that the Board issued and filed its original typewritten "Decision" (B. A. 2–16), it served upon petitioner a carbon copy thereof (P. A. 109–124) with a covering letter stating that "a copy of the Board's Decision" was enclosed (P. A. 109). The copy of the "Decision" was identical with the original except only that the date line was omitted and the lines upon which the signatures of the Board members appear were blank (P. A. 124).[3]

On June 15, 1940, the Board filed in the court below a petition for enforcement of its order (P. A. 99–102), and concurrently certified and filed in the court below a transcript of the entire record in the proceeding, including a printed copy of its said "Decision" containing its findings of fact, conclusions of law, and order. The printed copy, however, differs from the typewritten orig-

[3] As the court below pointed out (P. A. 139), petitioner addressed no inquiries to the Board to resolve the doubts, if any, it may have entertained concerning the document served upon it.

inal "Decision" in that (1) the first page of the printed copy adds a headnote and the date of the decision; and (2) the last page of the printed copy adds the words "Chairman Madden took no part in the consideration of the above Decision and Order," and omits the following words which appear at the end of the typewritten original (compare B. A. 2, 16, with P. A. 1, 3):

> Signed at Washington, D. C. this 2nd day of August 1937.
>
> [s] DONALD WAKEFIELD SMITH,
> *Member,*
>
> [s] EDWIN S. SMITH,
> *Member,*
> *National Labor Relations Board.*[4]

Petitioner filed an answer (P. A. 102–105) requesting denial of the Board's petition for enforcement, and thereafter moved the court (P. A. 105–124) for leave to file as part of the record in the case, the copy of the "Decision" which the Board had served upon it (*supra,* p. 4). The court denied the motion (P. A. 128–129).

On June 30, 1941, the court below, sitting *en banc* (P. A. 129–130),[5] handed down its opinion

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[4] It is the Board's practice, in enforcement and review proceedings in the circuit courts of appeals, to certify whenever possible a printed copy of the Board's decision as prepared by the Government Printing Office for inclusion in the Board's official reports, rather than a typewritten copy. This practice eliminates the necessity of retyping copies for purposes of certification.

[5] Petitioner does not raise the question whether a circuit court of appeals may be composed of all the circuit judges in

(P. A. 130–142), and on September 10, 1941, entered its decree (P. A. 142–144), enforcing the Board's order with a modification not here material.

ARGUMENT

1. There is no basis for petitioner's contentions (Pet. 2–3, 4, 5–6, 7–13) that the minor and immaterial variances (a) between the Board's original "Decision" and the carbon copy served upon petitioner, and (b) between the Board's original "Decision" and the printed copy certified by the Board in the court below as part of the transcript of record (*supra,* pp. 4–5), deprived the court below of jurisdiction to enforce the Board's order. Petitioner does not contend that it was misled or prejudiced by the variances; in any event, as the court below noted, "If respondent's [petitioner's] counsel had any doubts about the paper served on him, he knew the address of the office where a practical man could have these doubts resolved" (P. A. 139). These clerical and nonprejudical variances were clearly not jurisdictional defects; Congress, in providing for service of a copy of the Board's order upon

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active service, sitting *en banc*. That question is now before this Court in *Textile Mills Securities Corp.* v. *Commissioner of Internal Revenue*, No. 34, this Term, argued and awaiting decision. It has also been raised in *Oughton* v. *National Labor Relations Board*, No. 98, this Term, pending on petition for certiorari, and *Newark Morning Ledger Co.* v. *National Labor Relations Board*, No. 307, this Term, pending on petition for certiorari.

the affected person (Sections 10 (c), 11 (4)), and for certification and filing of a transcript of the record in the reviewing court (Sections 10 (e), 10 (f)), did not mean to withhold effective protection from interstate commerce by making an insubstantial deviation from exact reproduction a jurisdictional bar to enforcement.[6]

2. Petitioner's further contention (Pet. 3, 4–5, 6, 16–24) that the Act may not be applied to petitioner's operations is without merit, as the court below correctly held (P. A. 130–138). A clear basis for application of the Act to petitioner's enterprise rests on its receipt in interstate commerce of lumber, materials, and supplies exceeding $143,000 in value each year, and constituting almost all of petitioner's total purchases. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290–291; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 54; *Local 167, International Brotherhood of Teamsters* v. *United States,* 291 U. S. 293, 297. The circuit courts of appeals have uniformly held, in cases arising under the National Labor Relations Act, that the threat of obstruction to a flow of interstate commerce by labor

[6] Moreover, it is by no means clear that there were variances in the document required by the Act to be served. While the copy of the Board's "Decision" served on petitioner deviated from the original "Decision" in the respects noted (*supra,* p. 4), Section 10 (c) requires service only of the Board's order, not of its "Decision," and the Board's order contained in the original "Decision" (B. A. 15–16) was reproduced exactly in the copy of the "Decision" served upon petitioner (P. A. 122–124).

disputes arising in the state of destination warrants application of the Act.[7] There are no contrary decisions. And that petitioner's enterprise is small does not of itself immunize it from the Act. Cf. *United States* v. *Darby,* 312 U. S. 100, 123; *National Labor Relations Board* v. *White Swan Co.,* 118 F. (2d) 1002 (C. C. A. 4), certiorari denied, No. 279, this Term.[8]

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[7] *National Labor Relations Board* v. *Western Massachusetts Electric Co.*, 120 F. (2d) 455, 456–457 (C. C. A. 1); *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board*, 101 F. (2d) 841, 843 (C. C. A. 4), modified and affirmed, 308 U. S. 241; *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951, 955 (C. C. A. 4); *National Labor Relations Board* v. *Norfolk Shipbuilding & Drydock Corp.*, 109 F. (2d) 128, 129 (C. C. A. 4); *Virginia Electric and Power Co.* v. *National Labor Relations Board*, 115 F. (2d) 414, 416 (C. C. A. 4), certiorari granted with respect to other points and now awaiting decision, Nos. 25, 26, this Term; *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. (2d) 38, 40–41 (C. C. A. 6); *Wilson & Co.* v. *National Labor Relations Board*, decided November 17, 1941 (C. C. A. 7); *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 784 (C. C. A. 9), certiorari denied, 312 U. S. 678; *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. (2d) 539, 543 (C. C. A. 10).

[8] While proof of actual obstruction to interstate commerce is unnecessary since the Act exercises a preventive power (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 204, 222; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 326), it is noteworthy that petitioner's unfair labor practices in the instant case caused picketing which resulted in out-of-state drivers refusing to deliver materials to petitioner and returning to their state of origin (R. A. 93, 54–55).

Petitioner's contention (Pet. 19, 22–23) that this proper basis of jurisdiction[9] should be defeated in the instant case through application of the maxim *de minimis* is untenable. As the court below pointed out, "De minimis in the law has always been taken to mean trifles * * *" (B. A. 135). $143,000 of materials imported by petitioner annually and constituting almost 100 percent of its total purchases are far more than trifling—they "surely cannot be considered in the category of de minimis" (P. A. 135). Cf. *National Labor Relations Board* v. *White Swan Co.*, 118 F. (2d) 1002 (C. C. A. 4), certiorari denied, No. 279, this Term.

A further basis for application of the Act to petitioner's operations rests upon the fact that petitioner's truck drivers spend an appreciable portion of their time in direct hauling of materials across state lines (*supra*, p. 4). This traffic in which petitioner directly engages clearly constitutes interstate commerce and, since interruption or stoppage of petitioner's operations by industrial strife would burden and obstruct this interstate commerce, the Act applies to petitioner's operations.[10]

[9] Petitioner apparently concedes that out-of-state purchases may furnish a sufficient basis for application of the Act (Pet. 21).

[10] Cf. *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 606; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 263; *Washington, Virginia & Maryland Coach Co.* v. *National Labor*

## CONCLUSION

The decision of the court below is correct. There is no conflict of decisions. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
*Solicitor General.*

ROBERT B. WATTS,
*General Counsel,*
LAURENCE A. KNAPP,
*Associate General Counsel,*
MORRIS P. GLUSHIEN,
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*National Labor Relations Board.*

NOVEMBER 1941.

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*Relations Board*, 301 U. S. 142, 146; *National Labor Relations Board* v. *Hopwood Retinning Co., Inc.*, 98 F. (2d) 97, 99–100 (C. C. A. 2); *National Labor Relations Board* v. *White Swan Co.*, 118 F. (2d) 1002 (C. C. A. 4), certiorari denied, No. 279, this Term; *Texarkana Bus Co.* v. *National Labor Relations Board*, 119 F. (2d) 480, 482 (C. C. A. 8).

## APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of

adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If * * * the Board shall be of the opinion that any person * * * has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such

transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. * * *

* * * * *

SEC. 11. * * *

* * * * *

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. * * *

* * * * *

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